Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-526

In the Matter of

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License — RM-6122

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1988; Released: December 1, 1988

By the Commission:

INTRODUCTION

1. The Commission has before it a petition for rule making filed by Christian Voice of Central Ohio (petitioner).[1] Petitioner requests an amendment to the Commission's rules to provide a procedure whereby FM licensees could upgrade facilities on higher class adjacent or co-channel frequencies even where an upgrade would require modification of the licensee's community of license.[2] If the proposal were adopted, the Commission could amend the FM Table of Allotments and simultaneously modify licenses to specify higher class operation on the same or an adjacent channel, but at a different community, at the request of the licensee. However, the Commission would not entertain competing expressions of interest or competing applications for the amended allotment.

BACKGROUND

2. Petitioner is the licensee of an FM station on channel 224A at Zanesville, Ohio. As a result of the Commission's elimination of its rule limiting operations on twenty FM channels, including channel 224, to class A facilities, [3] petitioner examined whether it could upgrade its facilities on its present channel. Petitioner's engineering study found that class B1 operations were possible on its channel, but that in order to comply with the Commission's minimum distance separation rules, petitioner would need to relocate its antenna. However, petitioner determined that from any new site complying with the Commission's minimum distance separation rules, it could provide city grade coverage to South Zanesville, but not to its community of license, Zanesville.

3. On March 18, 1987, petitioner filed a petition for rule making to change its allotment from channel 224A at Zanesville to channel 224B1 at South Zanesville. Petitioner noted that Zanesville is presently served by two other local aural services, that the reallotment would provide a first local service to South Zanesville, and that the reallotment would therefore serve the Commission's allotment priorities. Petitioner made clear that, if the reallotment would trigger the opening of a filing window for competing applications for the reallotted channel, it would not pursue the reallotment. Petitioner stated that it preferred to retain its class A authorization rather than risk losing to a competing applicant for the reallotted channel. On June 16, 1987, the Mass Media Bureau returned the petition, noting that under current policy, if the requested amendment to the tables were made, the Commission would be required to specify a filing window, accept applications filed by any interested parties, and, if mutually exclusive applications were filed, resolve the mutual exclusivity in a comparative hearing. The Bureau relied on the Commission decision in *Riverside and Santa Ana, California*.[4]

4. The instant petition for rule making followed. Petitioner contends the requested procedure could provide significant public interest benefits by allowing the upgrading of service and changes in service that aid the attainment of our present 307(b) priorities. Petitioner argues that such changes in service are seldom proposed due to the risks inherent in a comparative licensing proceeding. Petitioner also contends that we have rejected the rationale for our decision in *Riverside*, and, therefore, we need not entertain competing applications when the city of license of an existing authorization is modified. Specifically, petitioner cites our decision in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*, for the proposition that when an existing authorization makes a channel unavailable, changes to the authorization may be made without entertaining competing applications for facilities on the channel.[5]

DISCUSSION

5. We believe petitioner's contentions have merit. Indeed, we believe petitioner's arguments, although limited in its petition to changes in an FM licensee's city of license if the change permits an upgrade of facilities, are applicable in other contexts. Therefore, we propose to amend Section 1.420 of our rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and TV Tables, and modification of its license accordingly, without placing its existing authorization at risk, and regardless of whether that change involves a change in transmitter site, a change in class of channel, or both. We request comments on the public interest benefits of the proposed procedure. We also request comment on our initial views that we should only utilize the procedure if the new community would serve our allotment priorities and policies, and only in those instances where the new allotment is mutually exclusive with the existing allotment.[6]

6. Present Commission policy treats any amendment to the Tables of Allotments changing an allotment's city of license as an event triggering an opportunity for interested parties to file applications for the allotment, regardless of whether the frequency is presently occupied.[7] In other contexts, however, the Commission has recognized that when a frequency is occupied, subjecting the licensee or permittee to the filing of competing applications as a result of an amendment to an allotment, even though the amended allotment is technically a "new" allotment, serves no useful purpose.[8] Indeed, the Commission has

recognized that requiring petitioners to run the gauntlet of a comparative hearing effectively squelches proposals which, if adopted, would further the public interest.[9]

7. We believe substantial public interest benefits could flow from adopting a procedure whereby the Commission could amend the Tables of Allotments and simultaneously modify the license of an existing licensee or permittee to specify a new city of license. First, the procedure will allow changes in the Tables of Allotments which better serve the Commission's present allotment priorities, thereby furthering the statutory goal of providing a fair, equitable, and efficient distribution of facilities among the several states and communities.[10] Our existing policy of requiring a licensee or permittee to risk loss of its present authorization to competing applicants forecloses proposals which, based on our allotment priorities, would result in a preferred distribution of facilities. We are of the tentative view that the proposed procedure, if adopted, should be utilized only in those instances where the petitioner is able to demonstrate that the proposed new community of license is preferrable under our allotment priorities and policies to the present community of license.

8. Second, the procedure could provide licensees and permittees with greater discretion in choosing and modifying technical facilities. Specifically, by using the proposed procedure either in conjunction with a transmitter site relocation or in conjunction with the Commission's procedures for modifying licenses to a higher class of channel in the course of rule making proceedings to amend the Tables, licensees and permittees may be able to improve their technical facilities in circumstances where they might not otherwise be able to do so. Commission policy generally favors upgrades in facilities.[11]

9. The proposed procedure is limited in scope to cases in which the proposed allotment is mutually exclusive with the present allotment. This approach, as opposed to an arbitrary distance limitation, properly limits the procedure's use to those cases in which it would provide public interest benefits that cannot otherwise be provided. Generally, a proposed amended allotment is mutually exclusive with an existing allotment if the city reference coordinates for the new allotment are closer to a licensee's or permittee's transmitter site than the minimum distance separations specified in our rules.[12] However, there may be instances in which a licensee or permittee proposes to modify its assignment to a community to which we could allot the same channel with a site restriction[13] in full compliance with the mileage separation requirements to the proponent's existing station.[14] In those cases, we tentatively believe it is appropriate to consider counterproposals for the site restricted allotment, and, if a counterproposal is filed, to prefer the new site restricted allotment to a change in the existing facility, since the site restricted allotment could provide a new service and is not mutually exclusive with the existing allotment.

10. Similarly, we tentatively conclude that the proposed procedure should be inapplicable to nonadjacent channel upgrades. Present procedures allow the Commission to modify a license or permit to a higher class nonadjacent FM channel in the same community if there are no other expressions of interest in use of the higher class channel or if an additional equivalent channel is available for allotment to the community.[15] Because the allotment of a channel nonadjacent to an existing licensee's or permittee's allotment can proceed regardless of whether the licensee proposes a modification of its community of license, we believe that such allotments should be made available for general application. We specifically invite comments on our analysis of these issues.

11. Present rules provide a procedure whereby television licensees and permittees may exchange intraband noncommercial and commercial channels if the Commission finds that the public interest, convenience, and necessity would be advanced.[16] Thus, the procedures we propose could also be used in conjunction with intraband exchanges of such television channels. There appears to be no valid reason for limiting use of the proposed procedure in the context of intraband commercial/noncommercial channel exchanges. On the contrary, there may be instances in which a channel exchange combined with a change in the city of license would allow the parties to the agreement to fulfill our allotment priorities by, for example, providing a first noncommercial or commercial service, where our present allotment scheme would not allow such service. We specifically invite comments on our preliminary view.

12. Because current Commission policy is to refrain from issuing a notice of proposed rule making proposing to change the city of license specified in an allotment unless the holder of an authorization specifically states that it is willing to compete for the amended allotment in comparative hearing with any new applicants for the allotment, virtually no petitions requesting such rule makings are currently on file with the Commission.[17]

CONCLUSION

13. In light of the foregoing, we propose the revision of Section 1.420 of the Rules to provide a procedure whereby licensees and permittees can seek modification of their authorization in the course of rule making proceedings to amend the FM and TV Tables of Allotments where the amendment and modification would change the allotment's city of license. We believe the proposed procedure could provide substantial public interest benefits in our administration of the FM and TV allotment schemes, by providing flexibility to licensees and permittees to propose changes which would serve our allotment priorities. Therefore, we seek comments concerning the proposed rule change.

14. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. ***Reason for Action:***

This action creates a procedure whereby an existing licensee or permittee may seek modification of its license in the course of rule making proceedings to amend the FM and TV Tables of Allotments without risking loss of its existing authorization to competing applicants for the changed allotment.

II. ***The Objective*** **:**

Through this proceeding, the Commission proposes to eliminate the requirement that a party wishing to change its city of license risk loss of its license for pursuing a proposal which would serve the public interest.

III. ***Legal Basis:***

Sections 4(i) and 303 of the Communications Act of 1934, as amended.

IV. ***Description, potential impact, and number of small entities affected:***

This proposal would enable existing licensees and permittees to seek changes in their city of license where the change would serve the public interest, without risking loss of their licenses, in circumstances where they presently would be required to place their authorization at risk in order to change their city of license. Therefore, it would allow greater licensee and permittee discretion in choosing facilities. Since no station would be required to make this change, no station would face additional or higher costs than at present.

V. ***Recording, record keeping, and other compliance requirements:***

None.

VI. ***Federal rules which overlap, duplicate or conflict with this rule:***

None.

VII. ***Any significant alternatives minimizing impact on small entities consistent with the stated objective:***

None.

15. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981).

PAPERWORK REDUCTION ACT STATEMENT

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement and will not increase or decrease burden hours imposed on the public.

EX PARTE CONSIDERATIONS

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or ortherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

COMMENT PROCEDURE

19. Under procedures set out in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 30, 1988,** and reply comments on or before **January 17, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W.

20. For further information regarding this proceeding, contact Karl Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1, Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. Section 1.420 is proposed to be amended by adding new paragraph (i) to read as follows:

§ 1.420 Additional Procedures in Proceedings for Amendment of the FM, Television or Air Ground Table of Allotments.

* * * * *

(i) In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license on the same channel, or on an adjacent or co-channel, or on any channel mutually exclusive with the licensee's or permittee's present assignment, where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

FOOTNOTES

[1] Public Notice was given on November 2, 1987, by Report No. 1688. No party filed comments on the proposal.

[2] For example, a licensee might propose the simultaneous modification of its authorization on channel 244A at City X to Channel 244C2 at city Y.

[3] *See FM Allocation Rules*, 2 FCC Rcd 660 (1987).

[4] 65 FCC 2d 920 (1977), *recon. denied*, 68 FCC 2d 557 (1978). In *Riverside*, we held that if an existing allotment is amended to specify a new community of license, the allotment must be made available for general application, even if there is an existing licensee on that allotment. We relied on *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In reaching our determination, we noted that no party had offered a public interest justification for departing from our general policy of making available new allotments for general application.

[5] *See* 60 RR 2d 114 (1986) (hereinafter cited as " *FM Adjacent and Co - Channel Upgrades*). In *FM Adjacent and Co - Channel Upgrades*, we determined that *Ashbacker* does not require that we open every changed allotment for general application. We found the public interest benefits accruing from upgraded FM facilities to be substantial, and determined that exposing existing licensees to the risk of competing applications deterred such proposals without providing any countervailing public interest benefit. We also noted that so long as a proposed new use by an existing licensee is mutually exclusive with its existing use, the channel is not available for use in an *Ashbacker* sense.

[6] As discussed *infra*, we do not believe the proposed procedure should be used in conjunction with non-adjacent channel upgrades.

[7] *See Riverside and Santa Ana, CA*, 65 FCC 2d 557 (1978); *Green Cove Springs, FL*, 3 FCC Rcd 2195 (1988).

[8] *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 51 Fed. Reg. 15628 (1986), *recon.denied*, 3 FCC Rcd 2517 (1988); *FM Adjacent and Co-Channel Upgrades*, 60 RR 2d 114 (1986).

[9] *Id.*

[10] *FM Adjacent and Co-Channel Upgrades*, 60 RR 2d 114 (1987).

[11] *Id.*

[12] The proposed procedure may be used in conjunction with both adjacent and co-channel changes for FM stations, and with co-channel, adjacent channel, and UHF taboo channels in the TV service. *See* 47 CFR §§ 73.207, 73.610, 73.698. Because our minimum distance separation requirements vary depending on the class of channels involved, and the nature of the relationship between the channels involved, the precise extent of the mutual exclusivity which triggers eligibility to use the rule will depend on the nature of the proposal.

[13] In making channel allotments, the Commission generally utilizes so-called "city reference" coordinates in determining the proposed allotment's compliance with our mileage separation requirements. *See* 47 CFR §§ 73.208, 73.611. However, the Commission may allot the channel with a "site restriction" if transmitter sites are available which comply with the Commission's mileage separation requirements and would provide city grade coverage to the community of license.

[14] For example, licensee A proposed to change its community from X to Y on its present frequency, Channel 244A. Channel 244A at community Y is short spaced to A's transmitter site on channel 244A at community X. However, Channel 244A can be used at community Y with a site restriction to avoid short spacing to A's station at community X.

[15] *See 47 CFR* § 1.420(g). For example, if an existing licensee proposes to upgrade its facilities for Channel 244A at community X to Channel 255C2 at community X, the upgrade is a non-adjacent upgrade. Generally, a non-adjacent upgrade is any upgrade in facilities where the higher class channel is not on a frequency within three channels on either side of the existing frequency.

[16] An intraband channel exchange is an exchange of a UHF for UHF channel, or a VHF for VHF channel. In contrast, an interband channel exchange is the exchange of a VHF for UHF channel. The Commission's rules do not provide for the exchange of noncommercial VHF channels for commercial UHF channels, and we have declined to consider such a rule. *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 51 Fed. Reg. 15628 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988). Therefore, we will not consider issues relating to interband exchanges of noncommercial for commercial channels in this proceeding.

[17] However, if in response to this notice the Commission receives petitions requesting a change in the city of license for an existing authorization, we will process such petitions and issue Notices of Proposed Rule Making conditioned on the outcome of this general proceeding, but withhold final action in the proceeding until the resolution of this docket.